2007

The Power of Information: The Clash Between the Public's Right to Know and the Government's Security Concerns in a Post-September 11th World

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THE POWER OF INFORMATION: THE CLASH BETWEEN THE PUBLIC'S RIGHT TO KNOW AND THE GOVERNMENT'S SECURITY CONCERNS IN A POST-SEPTEMBER 11TH WORLD

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I. INTRODUCTION

More than forty years ago, Congress created the Freedom of Information Act (FOIA) to protect citizens' right of access to information held by federal agencies. ¹ Thirty-five years later, two planes flown by terrorists crashed into the World Trade Center, killing thousands. Today, these seemingly unrelated events have created significant tension, as the government seeks to limit the flow of information because of fears about terrorism. For instance, in the wake of the attacks, Attorney General John Ashcroft issued a memorandum defining a new FOIA policy, one that tilts the scales more heavily in favor of secrecy.² In the years since 9/11, the flow of information from federal agencies seems to have been reduced to a trickle.

While not specifically outlined in the Constitution, the concept of freedom of information is as old as the United States. In 1787, during

our nation’s infancy, Thomas Jefferson asserted the people’s right to know the actions of their governors in a letter to Edward Carrington, Virginia’s delegate to the Continental Congress:

The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro’ the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

The tension between that American ideal of open government and the desire to contain certain information is palpable in the post-9/11 world. Advocates have lined up on both sides, while Congress has recently approved a study on the subject. The Department of Defense has granted St. Mary’s (Texas) University School of Law $1 million to study the interaction between terrorism concerns and the FOIA. The study will evaluate state freedom of information acts as they relate to terrorism, but St. Mary’s also hopes to create a model statute that Congress or state legislatures could adopt.

This Comment will explore the tension between the FOIA, which promotes an open society, and the “war on terrorism.” This Comment will explain the history of the FOIA and describe why its existence and strength are crucial to American society. This Comment will also address the St. Mary’s study, the purpose behind it, and the concerns about it. The Comment will then propose that the best way to resolve

5. Melissa Ludwig, St. Mary’s to Study Limits on Info Law, SAN ANTONIO EXPRESS-NEWS, July 7, 2006, at 1A.
6. Id.
7. Telephone interview with Jeffrey Addicott, Director, Center for Terrorism Law, St. Mary’s University, in San Antonio, Tex. (Oct. 25, 2006).
8. See infra Part II.
9. See infra Part IV.
the conflict is to create new guidelines within the FOIA that address terrorism issues.\textsuperscript{10} These guidelines should reflect legitimate concerns about security, but they should not be designed to bolster the trend of hiding information.

The government already has significant power to withhold information. Citizens who are denied access to government documents can file in federal court,\textsuperscript{11} but the courts generally defer to the executive branch in cases that implicate security concerns.\textsuperscript{12} The current statute contains no specific guidelines for terrorism, and legitimate security interests need to be protected. To the extent that the St. Mary's study, or any other effort, leads to new guidelines that address legitimate security concerns, while also respecting the need for open government, American society will benefit.

In addition to advocating generally for new guidelines, this Comment will discuss ways in which such guidelines could be written into the FOIA.\textsuperscript{13} In the process of limiting the release of information, the Bush Administration created a new information category labeled “sensitive but unclassified.”\textsuperscript{14} However, the Administration did not define the term, nor does it appear in the FOIA statute. One university study provided excellent insight into how a classification system could help to create new guidelines.\textsuperscript{15} The key to the system is a series of questions about the purpose of particular documents and the security concerns they present.\textsuperscript{16} The answers to those questions determine classification.\textsuperscript{17}

This Comment will propose a FOIA revision that incorporates elements of this model with a charge to federal agencies to define specific categories of information that need to be protected. The goal is not to increase the withholding of information, but rather to clear muddied waters in a way that prevents dangerous information from being

\textsuperscript{10} See infra Part VI.
\textsuperscript{12} See, e.g., Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 926–27 (D.C. Cir. 2003) (stating the judicial branch owes deference to the executive in cases implicating security). See also infra Part V.B.
\textsuperscript{13} See infra Part VI.
\textsuperscript{16} Gansler & Lucyshyn, supra note 15, at 30–32.
\textsuperscript{17} Id.
released, while also preventing the government from using security as an excuse to hide documents at will.

II. THE FREEDOM OF INFORMATION ACT

A. The FOIA and Its Security-Based Exceptions

The FOIA makes information about government agencies and information produced by government agencies available to the public. The crucial provisions of the FOIA include: describing the information that each agency must publish in the Federal Register; describing information that federal agencies must make available for “public inspection”; requiring that, with certain exceptions, proper requests for information shall be complied with “promptly”; requiring that a determination on whether to comply with a request be made within twenty business days; allowing citizens who wish to contest an agency’s decision to withhold information to file a complaint in federal district court; and laying out nine statutory exemptions, any of which will remove the agency’s obligation to disclose the information.

The statutory exemptions cover: (1) material “properly classified,” through an Executive Order, to protect the national defense or foreign policy; (2) internal personnel rules and practices of an agency; material specifically exempted by another statute; (4) trade secrets and commercial or financial information that is privileged or confidential; (5) inter-agency or intra-agency memorandums that would not be available by law to the general public; (6) personnel and medical files, the disclosure of which would be an invasion of privacy; (7) records or

19. Id. § 552(a)(1).
20. Id. § 552(a)(2).
21. Id. § 552(a)(3)(A). The first exception listed in this section is for material already published or made available pursuant to Sections 552(a)(1) and 552(a)(2). Id. The second exception states that agencies that are part of the “intelligence community” cannot give records to a governmental body that is not part of the United States, or to a representative of such a body. Id. § 552(a)(3)(E).
22. Id. § 552(a)(6)(A).
23. Id. § 552(a)(4)(B).
24. Id. § 552(b).
25. Id. § 552(b)(1).
26. Id. § 552(b)(2).
27. Id. § 552(b)(3).
28. Id. § 552(b)(4).
29. Id. § 552(b)(5).
30. Id. § 552(b)(6).
information collected for law enforcement purposes, if those records could reasonably be expected to cause one or more of six listed harms;\(^3\) (8) records relating to the regulation or supervision of financial institutions;\(^2\) and (9) geological and geophysical data regarding wells.\(^3\)

**B. The History of the FOIA**

President Lyndon Johnson signed the FOIA on July 4, 1966.\(^4\) The idea behind the FOIA was to open federal agencies to the scrutiny of the press and the American public.\(^5\) The press in particular pushed hard for the FOIA's passage, after facing unexplained denials of requests for information regarding important executive decisions.\(^6\) Congress also sought to obtain more information from what it viewed as a reclusive executive branch.\(^7\) The FOIA, which does not restrict who can receive information, changed the dynamic created by the 1946 Administrative Procedure Act.\(^8\) That law made information available only to people who could demonstrate they were "properly and directly concerned."\(^9\) Leading the effort to pass the FOIA was California Congressman John Moss, who began hearings on government secrecy in 1955.\(^10\) Moss supported his bill with this statement:

"[O]ur system of government is based on the participation of the governed, and as our population grows in numbers it is

\[^3\] Id. § 552(b)(7). There are six possible criteria for invoking the statutory exemption for law enforcement: such records should only be withheld if they (a) reasonably could be expected to interfere with enforcement proceedings, (b) would deprive a person of the right to a fair trial or impartial adjudication, (c) could reasonably be expected to constitute an unwarranted invasion of privacy, (d) could reasonably be expected to disclose the identity of a confidential source, (e) would disclose law enforcement techniques or guidelines that could reasonably be expected to lead to circumvention of the law, or (f) could reasonably be expected to endanger the life or safety of any person. Id.

\[^4\] Id. § 552(b)(8).

\[^5\] Id. § 552(b)(9).


\[^9\] Id. at 650–51.


\[^12\] The National Security Archive: Freedom of Information at 40, supra note 34.
essential that it also grow in knowledge and understanding. We must remove every barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.41

The FOIA has been amended five times since its inception,42 most recently by a 2002 prohibition against any intelligence agency distributing records to government entities outside of the United States.43 In 1974, Congress amended the FOIA to enact time limits on requests and to limit the law-enforcement exception.44 Another important amendment, passed in 1996, required agencies to make information available electronically.45 The states have followed the federal government’s lead, and now all fifty states have some type of freedom-of-information law.46

Long before the FOIA, U.S. courts recognized a common-law right to information. A U.S. Supreme Court opinion listed several cases, dating back as far as 1882, in which American courts recognized a “general right” to inspect documents.47 The phrase “general right” contrasted American common law with English common law, because English law recognized only a limited inspection right.48 The Court wrote that, “[i]n contrast to English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.”49 In other words, Americans did not need to show a particular reason why they would need the requested information.

42. See The National Security Archive: FOIA Legislative History, supra note 41 (offering a step-by-step recap of the history of each FOIA amendment).
46. Telephone interview with Jeffrey Addicott, supra note 7.
48. Id. at 597.
49. Id. (citation omitted).
C. The Reasons Behind the Freedom of Information Act

1. The FOIA Protects First Amendment Rights

The FOIA is important because it helps to protect America’s open democracy. Though the Bill of Rights does not provide for “Freedom of Information,” the FOIA protects First Amendment rights. Those rights guard individual freedoms by limiting the degree to which the government can control the people. For instance, the First Amendment expressly protects the freedom of the press. For an investigative journalist, the FOIA is a tool of the trade, as important as a stethoscope for a doctor or a wrench for an auto mechanic. The FOIA allows journalists to serve their most important roles, as watchdogs over the governors, and as conduits of information from the governors to the governed.

In the years following the FOIA’s passage, journalists used the statute to uncover stories such as: the death of ten elderly patients in a nursing home who were used as part of a drug experiment; radioactive contamination of drinking water in New Mexico; sloppy bookkeeping by colleges and universities that covered up the possible misuse of hundreds of millions of dollars of federal money; and an unusually high rate of birth defects from 1950–1964, caused by atomic bomb testing in Utah. FOIA use remains in full force, as evidenced by a small sample of articles from the fall of 2006. One news source used the FOIA to show how the Bush Administration was trying to prevent reporters from gaining information about links between hurricanes and global warming. A newspaper article used FOIA requests to detail how county officials in Virginia drove cars back and forth across the county, at taxpayers’ expense, to run up the mileage to avoid losing the cars. Another newspaper used the FOIA to show that the United States may not have the resources available to care for disabled Iraq war veterans.

While the press is a major beneficiary of the FOIA, the statute also bolsters other First Amendment rights, such as the freedom of speech and

50. U.S. CONST. amend. I.
53. See Lisa Rein, Ploys to Keep County Cars Arise in Fairfax, WASH. POST, Sept. 24, 2006, at C01.
54. See Dan Moffett, Veterans’ Care a Concealed Cost of War, PALM BEACH POST, Oct. 15, 2006, at 1E.
the right to "petition the Government for a redress of grievances."55 Through these rights, the Constitution protects the people's right to protest when they feel they have been wronged. This protest could be in the form of political speech or a more formal grievance. In either case, the FOIA helps to buttress those rights, because people can use the FOIA to learn what their government is doing. The more informed citizens become, the more likely they are to feel comfortable in speaking out.

One example is found in a Beavercreek, Ohio woman's letter to the editor of her local newspaper.56 She used the FOIA to obtain copies of the city's credit-card charges over a nineteen-month period, and she wrote, "What I found horrified me."57 Another example comes from an article about a campaign for county treasurer in western Illinois. The challenger accessed the phone records of the incumbent through the FOIA and found 188 phone calls from an individual with whom the incumbent had business dealings.58 Whether there was a plausible explanation for the calls was unclear,59 but this FOIA use is one example of how the FOIA adds to the political debate in places far from the nation's largest major media outlets.

2. The FOIA Protects Freedoms in Less Tangible Ways

While concrete examples of journalists and citizens using the FOIA are plentiful, the statute also provides an abstract benefit. Essentially, it reminds our elected representatives that their bosses, the people, are watching. Human nature dictates that many employees are more serious about their work when the boss is watching. The FOIA puts the bosses—the voting public—in position to oversee the government. When leaders know that their decisions and their writings will be open to public scrutiny, one can expect them to be more responsive to the people. As a federal judge wrote in Detroit Free Press v. Ashcroft, "Democracies die behind closed doors."60

By allowing citizens to peek behind the curtain, the FOIA operates as a "check against corruption" and "hold[s] the governors accountable

55. U.S. CONST. amend. I.
56. See Flo Thompson, Letter to the Editor, Your Letters: Taxpayers' Money Being Wasted, DAYTON DAILY NEWS (Ohio), Sept. 20, 2006, at A17.
57. Id.
59. See id. (The incumbent claimed he was running a "consumer-oriented office," and that the people who call often had both personal and business-related reasons for calling).
60. 303 F.3d 681, 683 (6th Cir. 2002) (opinion by Judge Damon J. Keith).
James Madison, the “Father of the Constitution,” offered these thoughts for his burgeoning nation in 1822: “A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”62 A former key player in the Bush Administration, Defense Secretary Donald Rumsfeld, strongly supported the FOIA as a Congressman in 1966. In a press release, Rumsfeld called the new law “a welcome step toward the goal of a more informed citizenry.”63 Because having an informed citizenry is crucial, the FOIA must be protected, even in times of turmoil.

3. Recent Efforts to Protect the FOIA Demonstrate Its Importance

While the executive branch and courts have taken steps to limit the FOIA,64 there are signs from all three branches of government that some leaders continue to believe in its importance. In December 2005, President Bush issued an Executive Order that recognized the importance of the FOIA.65 The Order’s stated goal was to “ensure appropriate agency disclosure of information,” and one of its most important provisions mandated that federal agencies designate a person to handle FOIA requests.66 The Order affirmed the importance of the FOIA in the post-9/11 era by asserting that a qualified person should address FOIA requests.67

Meanwhile, in Congress there is proposed legislation to strengthen the FOIA.68 Senate Bill 394, cosponsored by Senators Patrick Leahy and John Cornyn, would waive fees for non-traditional media outlets such as websites, giving them the same treatment as traditional media.69

64. See discussion infra Parts III.A, V.B.
66. Id.
67. Id.
The bill also would enable citizens to track FOIA requests over the Internet. Another bill, Senate Bill 589, would create an advisory commission with the goal of reducing delays in processing FOIA requests.

The judicial branch is sometimes reluctant to back the FOIA in the face of security concerns, but it, too, has offered its support at times. In one notable case, a New York federal district judge allowed the release of photos of prisoners abused at Abu Ghraib. The judge wrote, “Indeed, the freedoms that we champion are as important to our success in Iraq and Afghanistan as the guns and missiles with which our troops are armed.”

III. THE SHIFT TOWARD WITHHOLDING INFORMATION AFTER THE 9/11 ATTACKS

A. Government Concerns About Information Released Through the FOIA

1. The Executive Branch Leans Toward Withholding Information

While as an intellectual matter it is easy to trumpet the benefits of openness—and they are significant—there are legitimate reasons to protect some information. The war on terrorism and the FOIA clash when the government justifies withholding information by asserting it would be dangerous in the wrong hands. The government needs to protect certain information, and the FOIA—which does not have a section focused on terrorism issues—does not adequately address these concerns. However, the public should not allow the government to use security as an excuse for erecting an impenetrable wall between itself and the public. Congress needs to step forward and strike the proper balance between openness and security through a statute that strongly protects dangerous information, yet favors public disclosure in most extends that courtesy to additional media, such as Internet bloggers. *Judiciary Panel Approves Cornyn-Leahy Open Government Bill, supra* note 68. The House Government Reform subcommittee has approved a companion bill. Gary Martin, *Measure to Improve Access to Federal Records Advances*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 2006, at 4A.

71. *Id.*
72. See discussion *infra* Part V.B.
73. ACLU vs. Dep’t of Def., 389 F. Supp. 2d 547, 579 (S.D.N.Y. 2005).
74. *Id.* at 575.
cases.

Though the situation did not involve the FOIA, the present Administration showed an inclination toward secrecy even before the 9/11 attacks. Administration leaders convened an Energy Task Force, chaired by Vice President Dick Cheney. The group met in secret, and two Congressmen asked for an investigation by the General Accounting Office (GAO). When the GAO’s efforts to acquire information were rebuffed, the GAO filed a lawsuit, but that suit was dismissed.

After 9/11, the Administration clamped down on FOIA requests in the name of national security. Former Attorney General John Ashcroft issued a memorandum that signaled a major shift in FOIA policy. The Clinton Administration had directed agencies to withhold information only if its release would produce a “foreseeable harm”, that Administration also advocated a “presumption of disclosure.” In Ashcroft’s memo, he cautioned federal agency employees that before disclosing information under FOIA requests they should deliberate on the “institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” Ashcroft went on to promise that the Justice Department would defend all decisions to withhold records “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.” Agencies, therefore, were charged to think carefully before disclosing information pursuant to FOIA requests, and they were promised assistance if they declined to release information.

During the same time period, White House Chief of Staff Andrew Card also issued a significant FOIA memorandum, accompanied by a memorandum from the Department of Justice and the Information Security Oversight Office (ISOO). Card’s memo requested that the

76. Id.
77. Id. at 485 (citing Walker v. Cheney, 230 F. Supp. 2d 51, 75 (D.D.C. 2002)).
78. See O’Reilly, supra note 39, at 569.
79. Id.
80. Kirtley, supra note 75, at 483.
81. Memorandum from John Ashcroft, supra note 2.
82. Id.
Department of Justice and the ISOO review procedures for handling potentially sensitive information. The accompanying memorandum charged federal agencies to consider requests on a “case-by-case” basis, with an eye toward national security. The accompanying memo also called on agencies to use a new category called “sensitive but unclassified” information, and yet it did not define what “sensitive but unclassified” meant. These memos highlight one problem with the current policy. If agencies are directed to consider national security carefully, and those directives are vague, uncertainty may cause agencies to withhold information that could properly be disclosed.

The Homeland Security Act of 2002 created a new designation for information called “sensitive homeland security information”; it refers to information originating with government agencies and shared between state, local, and federal governments. The Act states that such data includes information that “relates to the threat of terrorist activity; relates to the ability to prevent, interdict, or disrupt terrorist activity; would improve the identification of a suspected terrorist or terrorist organization; or would improve the response to a terrorist act.” The Act does not clarify the significance of information being classified in that way, but the wording demonstrates a preference for broad language that places a large amount of information in a protected category.

2. The Administration’s Policies Have Made an Impact

There is ample evidence that the Administration’s attitude has had a chilling effect on the release of information. In 2004, the U.S. government set a record by classifying 15.6 million documents—a rate of approximately 125 per minute and nearly double the number classified in 2001.


84. Id.
86. Id. at 676.
91. Scott Shane, Official Secrecy Reaches Historic High in the U.S., INT’L HERALD
Internet, including some material that had been publicly available for years.\(^{92}\) In some cases, even bibliographic information was removed, eliminating all evidence that the information existed.\(^{93}\) In 2003, a report by the Government Accountability Office found that approximately one-third of FOIA officers said they were less likely to make discretionary disclosures under the FOIA than they were before 9/11.\(^{94}\) Of those less likely to give out information, seventy-five percent cited Ashcroft's memorandum as the main reason.\(^{95}\) As one academic has noted, the national consensus favored open access to records before the 9/11 attacks.\(^{96}\) "Since then, something may have changed."\(^{97}\)

In an extreme example of secrecy, the CIA has refused to give up two particular Presidential Daily Briefings, dated Aug. 6, 1965, and April 2, 1968.\(^{98}\) A political science professor at the University of California at Davis wanted them for a journal article, and the CIA's refusal led to litigation.\(^{99}\) The CIA argued that the information in presidential briefings, no matter how old, can create a "mosaic" that terrorists can use in piecing together how our government operates.\(^{100}\) Considering the likelihood that government operations have changed significantly over forty years, this decision by the CIA offers one clear case of the government going too far in the name of security.

The executive is not the only branch with the power to squeeze the FOIA. One of the nine FOIA exemptions allows agencies to withhold information if the information is exempted from FOIA disclosure by another statute.\(^{101}\) As of the spring of 2003, there were approximately 150 federal statutes that exempted information from FOIA disclosure.\(^{102}\) One example is the Critical Infrastructure Information Act,\(^{103}\) a subsection of the Homeland Security Act that encourages the private

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\(^{92}\) McDermott, supra note 83, at 673.

\(^{93}\) Id.


\(^{95}\) Id.

\(^{96}\) O'Reilly, supra note 39, at 559.

\(^{97}\) Id.

\(^{98}\) Marie Cocco, They've Got a Secret: A Scholar Learns that Even 40-Year-Old Papers Are Suddenly Off Limits, AM. PROSPECT, July 1, 2006, at 11.

\(^{99}\) Id.

\(^{100}\) Id.


\(^{102}\) O'Reilly, supra note 39, at 571.

sector to share information with the Department of Homeland Security. Information that is designated as "critical infrastructure information" can be labeled as exempt from FOIA disclosure, and the information cannot be used in any civil proceeding without the written consent of the company providing it. A more pedestrian example is the general rule of non-disclosure that appears within the Internal Revenue Code.

B. Government's Concern Highlighted by Dissertation

The government's move toward non-disclosure is in some respects alarming, but a graduate student's dissertation showed that some safety concerns are warranted. Sean Gorman of George Mason University was able to map the United States' entire fiber-optic network. Gorman used mathematical formulas to "determine how to create the most havoc with a hedge clipper" by cutting an important wire. All of the data Gorman used in his study was available over the Internet from government agencies. While no doubt A-level work, Gorman's dissertation caused a controversy over whether it should be published. Even if Gorman's work is never disseminated, the more serious concern is that any terrorist with Gorman's computer skills could have done the same thing. Information about America's vulnerabilities has obvious value to terrorists and should be safeguarded. This scenario shows that the "mosaic" argument advanced by the CIA has merit in certain cases, even if it was over-protective in connection with forty-year-old briefings.

This concern, that the Internet could provide terrorists with dangerous information or could give them a vehicle to effectuate an attack, will be one focus of the St. Mary's study. Jeffrey Addicott, director of St. Mary's Center for Terrorism Law, stated, "We're going to have a 9/11 of cyber-terrorism, or a Pearl Harbor of cyber-terrorism—it's coming; it's a matter of time."

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104. Pack, supra note 14, at 826.
105. Id.
108. Id.
109. Id.
110. Id.
111. Telephone Interview with Jeffrey Addicott, supra note 7.
112. Id.
agencies is to keep close track of what goes out on the Internet. However, security concerns should be weighed against other matters of public interest. For example, airplane and train schedules should not be taken out of the public domain simply because their widespread distribution could be useful to terrorists. The value of such schedules being readily available to the public is simply too high.

IV. STUDYING POSSIBLE CHANGES TO THE FOIA

A. St. Mary’s Will Evaluate, and Try to Improve, Federal and State Laws

The tension between the goals of the FOIA and the government’s security concerns provided the impetus for St. Mary's study. In July 2006, the Department of Defense awarded St. Mary’s Center for Terrorism Law a $1 million grant to evaluate how the FOIA should interplay with the war on terrorism. Several articles have framed the study as an effort to revise the federal FOIA, but Addicott called those reports inaccurate. Addicott said he became interested in the topic when several states—the number is now at least forty-one—passed new freedom of information laws after 9/11.

The idea behind the study is two-fold. First, St. Mary’s will study what the states are doing and try to advise them on “whether they have gone too far or not far enough” in withholding information. Second, the study will try to create a model statute that could be used by state legislatures or Congress. As part of that effort, St. Mary’s will host interested parties from across the political spectrum at the end of the eighteen-month study. Addicott said he expects Congress, which

113. See, e.g., Carlos Guerra, Pentagon’s $1 Million Grant to St. Mary’s Raises Several Questions, SAN ANTONIO EXPRESS-NEWS, July 13, 2006, at B1 (arguing that the grant to St. Mary’s is designed to increase government secrecy and discussing four questions the grant raises). The issues, as framed by the author, were: whether this was another effort by a secretive administration to “shut government’s windows . . . even tighter”; the number of other grants that are planned to “make government more secretive”; whether the research is truly necessary; and whether the Department of Defense has the right priorities when it is spending $1 million for this study and not for other matters. Id.
114. Id.; Ludwig, supra note 5, at A1.
115. Telephone interview with Jeffrey Addicott, supra note 7.
116. Id.
118. Telephone interview with Jeffrey Addicott, supra note 7.
119. Id.
approved the study’s funding, to be interested in the results.\textsuperscript{120}

In addition to concerns about cyber-terrorism, Addicott’s study will focus on the nation’s critical infrastructure, including “information about water, sewer, electricity and transportation systems.”\textsuperscript{121} Though some articles have indicated concern about his motives, Addicott insists that all viewpoints will be represented, and that he is not out to quash civil liberties.\textsuperscript{122} However, when asked to reveal his personal stance, he leaves little doubt where his views fall:

My basic overall philosophy on the war on terror is, if you look at [the Center for Terrorism Law’s] symbol, you’ll see the scales of justice, and you’ll notice that they’re not balanced. I accept the premise that we’re at war, and I accept the premise that in a time of war, increased security is going to weigh heavier than civil liberties. Now, where that line should be drawn on each and every issue is where we debate these things.\textsuperscript{123}

B. Concerns About the St. Mary’s Study

Despite Addicott’s assertions, some commentators look at his personal views, as well as the DOD’s funding of the study, and express concern about the impact the study could have on the federal FOIA.\textsuperscript{124} Paul McMasters, a public information expert at the First Amendment Center, said he was concerned about a FOIA study funded by “a federal agency where secrecy is paramount.”\textsuperscript{125} Other open government advocates believe Addicott has changed his tune publicly because of initial outcries against the idea that the study will add to government secrecy.\textsuperscript{126} One editorial argued that instead of spending $1 million to restrict information, the government should “reaffirm the public’s right to know. That wouldn’t cost a thing.”\textsuperscript{127} In addition, a St. Mary’s alumnus was outraged that his school would participate in such a study, saying it “directly contradicts our mission statement and the values of the

\textsuperscript{120} Id.
\textsuperscript{121} Ludwig, supra note 5, at A1.
\textsuperscript{122} Telephone interview with Jeffrey Addicott, supra note 7.
\textsuperscript{123} Id.
\textsuperscript{124} See, e.g., Ludwig, supra note 5, at A1 (quoting advocates of open government criticizing St. Mary’s FOIA study).
\textsuperscript{125} Id. McMasters also said that clarifying the FOIA was “not a bad idea”, and the source of the project’s funding was his primary concern. Id.
\textsuperscript{126} Rebecca Carr, Cornyn at Center of Debate Over Records Access, AUSTIN AM.-STATESMAN, Sept. 29, 2006, at A1.
\textsuperscript{127} Editorial, Research for Secrecy Harms Right to Know, DETROIT FREE PRESS, July 26, 2006, at 14.
Addicott said he was shocked by the uproar, and he was upset about the level of "misinformation." Senator Cornyn, cosponsor of the legislation to strengthen the FOIA, helped to secure the grant for St. Mary's. A purported advocate of open government, Cornyn said the fears about St. Mary's study are understandable, but incorrect. Cornyn said he hoped the public pressure would help to ensure that the study would find ways to protect access to information in the face of "security-driven laws."

Given Addicott's promises to bring in advocates of all viewpoints, and given Cornyn's involvement, it seems likely the study will be open-minded. If so, the study could be extremely helpful and would be a welcome addition to the dialogue in a complex and important area. Given that the FOIA has not been updated to reflect terrorism concerns, Congress should look seriously at any model statute the study would produce, provided that the model protects civil liberties as vigorously it protects vulnerable targets. "It's a very important issue, and you've got views on all sides of the issue," Addicott said. "We're anxious to see what falls out."

V. THE FOIA NEEDS TO BE CLARIFIED, BUT ITS IMPORTANCE SHOULD BE RESPECTED

A. The Importance of Balancing Security and Openness

Given the complex issues that terrorism presents regarding information access, the FOIA needs to be updated for the twenty-first century. While the government sometimes goes too far in using terrorism as an excuse for hiding information, the fact remains that terrorists attacked the country on 9/11, and another attack is possible. Terrorism is a pervasive issue in the United States and in the world, and the FOIA is incomplete without terrorism guidelines. Whether the FOIA's balance favors security or civil liberties, the statute should address these important issues.

128. Guerra, supra note 113, at B1. The alumnus also said he planned to organize other St. Mary's alumni in an effort to pressure the school to return the grant. Id.
129. Telephone interview with Jeffrey Addicott, supra note 7.
131. Id.
132. Id.
133. Telephone interview with Jeffrey Addicott, supra note 7.
134. Id.
Several FOIA exemptions potentially apply to terrorism situations, namely the exemptions for classified information, for material exempted by other statutes, and for matters related to law enforcement. Still, those sections are written in generalities and do not adequately address terrorism issues. Congress, therefore, should revise the statute to clarify how agencies should handle information requests that implicate concerns about terrorism. In doing so, Congress should not seek to weaken the FOIA. Congress should of course consider the threats presented by terrorism, but Congress also should remember the reasons that maintaining the flow of information is important to a free society.

B. Judicial Deference to the Executive Branch on Matters of Security

One reason Congress should carefully guard openness when revising the FOIA is that the FOIA already has been weakened. Many argue that in a time of war, security should take precedence over civil liberties. Even if one agrees with that statement, there is no need to further restrict information; the scales are already balanced in favor of security. In addition to the actions the executive branch has taken to limit access, the judicial branch has in many cases waved a white flag when confronted with security issues.

In perhaps the most significant FOIA case since the 9/11 attacks, Center for National Security Studies v. United States Department of Justice, the Court of Appeals for the District of Columbia Circuit deferred to the executive branch. Several public interest groups filed suit seeking information about people detained after the 9/11 attacks—including their names, the names of their attorneys, and the reason for their detention. The district court held that the FOIA required the release of the names of detainees and their attorneys, but all other

136. Id. § 552(b)(3).
137. Id. § 552(b)(7).
138. Telephone interview with Jeffrey Addicott, supra note 7. Addicott said the scales of justice appear on the Center for Terrorism Law’s website, but those scales are not balanced. Id. Security is weighted more heavily than liberty. Id.
139. See discussion supra Part III.A.
140. 331 F.3d 918 (D.C. Cir. 2003).
141. See id. at 931 (“[I]t is the responsibility of the [executive] not that of the judiciary to determine when to disclose information that may compromise intelligence sources and methods.” (alteration in original)).
142. Id. at 920.
information could be withheld. The D.C. Circuit partially reversed the decision, holding that the government did not have to give out any information. The court cited the "law enforcement" exemption under the FOIA, even though the names of people arrested are traditionally public record. The issue was whether revealing the names was "reasonably likely to interfere with enforcement proceedings."

The court’s holding was extremely deferential to the executive. The opinion, by a 2–1 vote, stated that the court could rely on government affidavits in determining whether revealing the names was "reasonably likely to interfere." The majority declined to rely on its own judgment, stating that "the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview." The opinion suggests that as long as the government can produce an argument as to why information should not be released, the court will defer to the executive branch. Such analysis hardly seems to serve the system of checks and balances, although it does comply with precedent.

A case decided sixteen years before 9/11 that still casts a long shadow is CIA v. Sims. From 1953 to 1966, the CIA operated a program called MKULTRA designed to control human behavior, intending to counter Russian and Chinese advances in brainwashing. Two citizens filed suit seeking information about grant proposals, contracts, and names of individuals who were involved with the project. In holding for the CIA, the U.S. Supreme Court wrote, "The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."

The trend toward judicial deference continues today. In 2006, a federal district court in California ruled for the Army after the Army had declined a FOIA request. The Los Angeles Times wanted copies of

143. Id. at 923.
144. Id. at 926.
145. Id.
146. Id.
147. Id.
148. Id. at 926–27.
150. Id. at 161–62.
151. Id. at 162–63.
152. Id. at 179.
Serious Incident Reports that private security contractors in Iraq had submitted to the Army. In denying the Times’ request, the court stated:

The test is not whether the court personally agrees in full with the [Agency’s] evaluation of the danger—rather, the issue is whether on the whole record the Agency’s judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [Agency] is expert and given by Congress a special role.

Even in *ACLU v. DOD*, the case that upheld disclosure of Abu Ghraib photographs under the FOIA, the court noted the presumption in favor of the government. In most instances, the judge wrote, the CIA is allowed to give a “Glomar response” when evaluating a FOIA request. This term means that the CIA neither admits nor denies that a requested document exists. Noting that the FOIA calls for “de novo review” of challenges to agencies’ withholding information, the court stated that, usually, courts hold that “the administrative assertions of secrecy should be accepted without much, if any, de novo review.”

This line of cases demonstrates that judges—whether constrained by precedent or by their relative lack of expertise with national security issues—are reluctant to overrule executive decisions to withhold information. These cases also demonstrate why the FOIA needs to be clarified, and why new, terrorism-specific exemptions could actually help to open some records. Under the current system, the judges can rely only on their interpretations of FOIA exemptions that are not terrorism specific. If Congress, through the FOIA, commanded federal agencies to list specifically information that must be withheld, then judges likely would feel more comfortable in releasing information that did not appear on those lists. Judges likely would be emboldened knowing that a statute—written by Congress and further defined by executive agencies—had created a presumption of disclosure for particular records.

The *Center for National Security Studies* case offers one example of why an updated FOIA could lead to the release of more documents. Had there been specific guidelines for withholding information, and had those guidelines not directed the withholding of names of people detained by
the government, the judges might well have felt more comfortable about releasing that information. Instead, the judges faced a non-specific FOIA statute that left ample doubt as to how to proceed, along with a Supreme Court precedent—Sims—that charged them to defer to the executive.

The government should always have the opportunity to show a judge that it has specific and important reasons for withholding information in a particular case, but in Center for National Security Studies, the government provided no such information. The government’s main arguments for withholding the names were that disclosure would deter the detainees from cooperating with the government, and that disclosure would “allow terrorist groups to map the course of, and thus impede, its investigation.” The government was simply presenting theories about what might happen, not presenting concrete evidence of what would happen.

The opinion states the majority felt it unwise to “second-guess” the executive. While the merits of this decision are debatable, there should be great concern over a system in which the judiciary does not feel empowered to act as a check on the executive branch. The problem is not in the judges—it is understandable that they are afraid to overrule the executive branch when interpreting an uncertain law. The problem is in the uncertainty created by the statute.

C. Openness and Security Are Not Always Mutually Exclusive

1. Greater Knowledge May Prevent or Lessen Disasters

In many cases, the debate about which records should be revealed is presented as a binary, mutually exclusive choice: Either the policy favors security or it favors openness. However, such a construction oversimplifies the situation. The climactic scene in the movie The Silence of the Lambs dramatically illustrates a different perspective. Jodie Foster’s character is chasing the villain, and her situation seems

161. Id.
162. The district court rejected the government’s arguments. Id. at 924. The circuit court, however, overruled the district court’s decision. Id. at 928.
163. The court stated that in FOIA cases, the judiciary “is in an extremely poor position to second-guess the executive’s judgment in this area of national security.” Id. at 928. The court also stated that judges have “consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.” Id. at 927.
impossible because the house is dark; he has night-vision goggles, and she does not. The audience feels frightened for her, as she stumbles around with her hands shaking, because she is facing a danger that she cannot see. The point this scene illustrates is, the more people know about the dangers around them, the safer they will be. In the terrorism context, a free exchange of ideas could lead to a greater awareness of vulnerabilities, and that awareness could lead to effective action.

A twenty-one-year-old disaster on the other side of the globe offers a pertinent example of how information-sharing could lead to greater safety. In the former Soviet Union, the causes and aftermath of the 1986 Chernobyl nuclear plant meltdown taught important lessons to government officials and led to a more open society.\textsuperscript{164} Government leaders learned that "political openness is essential for preventing and responding to such accidents because, without it, only a few people benefit from past experience."\textsuperscript{165} Discussion about the disaster and its aftermath led to the creation of a new college of radiology in Belarus, to assist doctors and others who need training in dealing with the effects of radiation.\textsuperscript{166}

A more general conclusion is that secrecy will eventually lead to accidents. Although keeping the public in the dark about an accident may help in the short term, it increases the long-term public concern about other accidents. Bureaucrats often justify secrecy by arguing that the population is too ignorant to cope with the truth . . . . If the governments of the world provide education and learn to avoid secrecy, nuclear power may thrive in the former USSR and throughout the world.\textsuperscript{167}

On the domestic side, the 9/11 Commission's Report noted that a lack of information sharing contributed to a breakdown in intelligence.\textsuperscript{168} As the judge in \textit{ACLU v. DOD} wrote, information that

\begin{itemize}
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} The Commission's report stated: "Information was not shared, sometimes inadvertently or because of legal misunderstandings. Analysis was not pooled. Effective operations were not launched. Often the handoffs of information were lost across the divide separating the foreign and domestic agencies of the government." \textit{National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report} § 11.4, at 353 (2004), available at http://www.9-11commission.gov/report/911Report_Ch11.pdf.
\end{itemize}
was kept secret might have been useful to agents in the field.\textsuperscript{169} Such secrecy can create a sense of competition among agencies, leading to a multiplicity of intelligence-gathering sources, rather than an effective allocation of resources across agencies.\textsuperscript{170} Whether greater information sharing could have prevented the 9/11 attacks will never be known, but the potential that such sharing might have prevented the attacks provides a useful lesson.

While the free exchange of information could help to prevent major disasters, one can also envision openness assisting with safety on a smaller scale. For instance, a person living one mile from a nuclear waste facility might want information about dangers the facility presents. Given fears about terrorism, that type of data should not be generally available on the Internet, but it could be valuable to certain people. Any FOIA amendment must address this balance. There is also a plausible argument that information exposing vulnerabilities could create pressure to fix those problems before terrorists can exploit them. Paul McMasters has articulated this argument in saying, “We are not restricting anything from those seeking to harm us, but we are keeping in the dark the citizenry who might generate pressure to reduce vulnerabilities.”\textsuperscript{171}

2. Security of Individuals Also Is Important

One other crucial point about the relationship between safety and openness is that security should not always be conceptualized in terms of the masses. Often, the words of Mr. Spock from \textit{Star Trek} should guide policy: “[T]he needs of the many outweigh the needs of the few.”\textsuperscript{172} But while protecting the general population is the first priority, leaders should not forget the words of Dr. Martin Luther King, Jr.: “Injustice anywhere is a threat to justice everywhere.”\textsuperscript{173} The government has an obligation to all of its citizens, and when it detains more than one thousand individuals, with no explanation as to why they have been detained,\textsuperscript{174} such actions raise questions about whether the government

\begin{footnotes}
\item[170] Id.
\item[171] Ludwig, \textit{supra} note 5, at A1.
\item[174] See Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 920–21 (describing the broad scope of the government’s investigation after the September 11th attacks).
\end{footnotes}
is truly protecting security. Certainly, the detainees' personal security has been violated, with no evidence that the violation is justified. To the extent that the FOIA can provide information about such actions, it sheds light on the government and prevents the government from abusing its power. In doing so, the FOIA helps to protect the safety of individuals who have been or could be wrongfully targeted.

None of these arguments is meant to suggest that greater openness always leads to greater security. As previously noted, Gorman's thesis about the fiber-optic network demonstrated how too much information in the wrong hands could be dangerous. The key point is simply that one should not always assume that the path to greater security should be dimly lit.

D. Fear Should Not Create an Imbalance Between Security and Rights

On a more abstract level, the current government should be concerned about whether it is falling into a trap that has captured previous American governments. Previous governments have not always held true to American ideals in times of strife. When fear takes hold of the nation, individual rights are a frequent victim. For instance, during World War I, two statutes made it illegal to criticize the draft and the war. During World War II, 120,000 Japanese-Americans were uprooted and placed into "concentration camps," and not one was charged with a crime implicating national security during that time. During the McCarthy era of the 1950s, fear of Communism caused many innocent people to lose their jobs and their liberty.

Noted constitutional scholar Erwin Chemerinsky has argued that, since 9/11, the government has repeated past mistakes by quashing civil liberties "in the name of national security." As evidence of this, Chemerinsky cites the government's detaining of suspects without access to the courts, the secrecy surrounding those people detained in the wake of the 9/11 attacks, and the "invasions of the right to privacy" permitted by the Patriot Act. The point about secrecy directly implicates the FOIA, but the article raises a more general point that applies to any

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175. See Blumenfeld, supra note 107 (demonstrating how a graduate student's dissertation could act as a guide to terrorists by showing them how to damage the United States' fiber-optic network).
177. Id.
178. Id.
179. Id. at 761.
180. See id. at 761–67.
debate over security and individual rights. The government should take care not to panic and over-react in response to national security threats. When fear has driven national security decisions, those decisions often prove to be wrong in hindsight. The withholding of information may not rise to the level of those past affronts to civil liberties, but a free flow of information helps to ensure that the government will not violate citizens' fundamental rights. Any threat to the people's ability to govern themselves presents a greater threat to the people's rights, and the FOIA enhances citizens' ability to self-govern.

Advocates for strongly protecting information argue that the country is at war, fighting against terrorism. Even if one accepts the premise that the United States is at war, however, the country must work to protect citizens' information rights within the context of that war. The simple reason is time—this war has no foreseeable end. If the government withholds information to an unwarranted degree, there is no guarantee that openness will return. The war against terrorism is the new reality; it is not a special condition that calls for a temporary policy change. Rather, the government must develop long-term policies that protect people from physical harm while also protecting their access to information.

E. This Mosaic Shows That Access to Information Must Be Protected

In defending the withholding of information, the executive branch is fond of the mosaic argument, which states that pieces to a puzzle can create a damaging total picture. However, one can also create a mosaic of reasons that a revised FOIA should respect the people's right of access. That mosaic includes the Administration's efforts to restrict access, the courts' deference to the executive on security issues, the ability of information to enhance security in certain cases, and the lessons the country can learn from past affronts to civil liberties.

181. Addicott stated, "If you accept the premise that we are at war, every war requires an increase in security measures; there has never been a war in which that hasn't occurred." Telephone interview with Jeffrey Addicott, supra note 7.

182. See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 924 (D.C. Cir. 2003) (claiming that while no one piece of information would necessarily damage national security, all of the information collectively could pose a danger).
VI. NEW FOIA GUIDELINES FOR TERRORISM SHOULD AIM FOR BALANCE AND SPECIFICITY

A. Finding Consensus Between the Extremes

To revise the FOIA in a manner that accounts for terrorism concerns will first require a degree of consensus building. Advocates at one extreme may feel that every exemption to the FOIA is one too many. Advocates at the other extreme may feel the FOIA is not worth protecting, and that information with any potential for harm should be exempt from disclosure. Perhaps it would help the debate for Congress and legislators to think in the long-term. Those who distrust the current Administration might be ignoring legitimate security issues, simply because they feel this Administration is too secretive. Meanwhile, those who give the present Administration their unconditioned trust might be unduly tolerant of secrecy because they agree with the Administration’s policies regarding terrorism.

The issues on both sides of this debate could hardly be more important. The Constitution’s first paragraph addresses the government’s responsibility to “provide for the common defence,”183 and the First Amendment preserves several freedoms protected by the FOIA.184 Therefore, concerns about freedoms and security should both be given tremendous weight and respect during the discussion.

B. A University of Maryland Study Offers a Helpful Model

In 2004, researchers at the University of Maryland examined the question of how the government should handle classifying documents in the post-9/11 world.185 The authors’ mission was similar to what this Comment advocates Congress’s mission ought to be. The article’s Abstract states:

With the goal of defining a comprehensive policy to govern truly sensitive information—yet with a preference for maximizing openness—the authors argue for a system of Controlled Unclassified Security Information (CUSI), where a mixture of regulation, cooperation, and review, balanced with sector-specific values, optimally unite to manage highly-

183. U.S. CONST. pmbl.
184. See discussion supra Part II.C (addressing how the FOIA buttresses the freedoms of the press, of speech, and of the right to petition for a redress of grievances).
185. See generally Gansler & Lucyshyn, supra note 15.
selective and well-defined sensitive areas.  

The study calls for an Executive Order defining the categories of information to be protected, rather than an amendment to the FOIA. Because the FOIA exempts any information "properly classified," an Executive Order could have the desired effect. Any Executive Order that defined information that ought to be kept secret would have a significant impact on the operation of the FOIA. However, based on this Administration’s general preference for withholding information, one should question whether an Executive Order would properly balance security and openness. Therefore, this Comment argues that the FOIA is the most sensible vehicle for defining what should or should not be withheld. Ultimately, though, the semantics of how a clarification to the FOIA takes place are less important than the specifics of what goes into that clarification.

The Maryland study outlined some of the critical issues in the debate, including the reasons for favoring openness and some of the major concerns about information in the hands of the wrong people. Among the concerns the article cites are the breakthroughs in life sciences that could lead to the development of biological weapons, the availability of information regarding weapons of mass destruction, and more generally, the amount of potentially harmful information available on the Internet. For instance, the Nuclear Regulatory Commission temporarily shut down and removed certain content from its website after officials reviewed the information available, which included the geographic coordinates of nuclear power plants.

The Maryland study’s authors advocate separate guidelines for the three “sectors” that have an interest in this type of information: the public, private, and academic/scientific sectors. In each area, the study argues, particular goals are paramount: openness and responsiveness in the public sector; trade secrecy and autonomy in the private sector; and collaboration and academic freedom in the

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186. Id. at Abstract.
187. Id. at i.
189. See discussion supra Part III.A.
191. See id. at 10–17.
192. Id. at 10–13.
193. Id. at 13–15.
194. Id. at 15–16.
195. Id.
196. Id. at 23–24.
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The study aims to weigh goals based on those objectives, but the authors acknowledge the challenge that particular information often overlaps from one sector into another. Having established that framework, the study suggests a new category of information that is not classified but presents security concerns—Controlled Unclassified Security Information (CUSI). CUSI is "information that, if improperly disseminated and utilized, could egregiously endanger public safety." CUSI is divided into three categories. The first category is information "relating to the research and development, production, and employment of weapons of mass destruction . . . " The authors note the difficulty of reining in the scope of information that could potentially fall into this category. The second category is information about critical infrastructure, meaning public and private entities that are "critical to maintaining . . . national defense, public safety, economic prosperity, and a high quality of life." Examples include banks, transportations systems, telecommunications, and agencies that provide vital human services. The third category is intelligence and security information, such as the information shared among governments that is protected by the Homeland Security Act. The authors posit that certain information should be labeled as sensitive when there may not be time to issue security clearances to government officials who may need the information.

Once an agency determines that information falls into one of these three categories, it must consider four questions in determining whether information should be disclosed. The first question is whether the

197. Id. at 24.
198. Id. at 25–26.
199. Id. at 27.
200. Id.
201. Id. at 28.
202. Id. (explaining that "[i]t may be demanding to implement such a control regime, as the scope of information that could be useful for the development of weapons of mass destruction continues to expand because of dual-use fundamental technologies that enable, for example, chemical and biological weapons").
203. Id.
204. Id.
205. Id. at 29. The sensitive information protected by the Homeland Security Act "consists of intelligence information that must be shared between federal, state, and local officials to prevent and react to terrorist attacks." Id. See 6 U.S.C. § 482 (Supp. IV 2004) (defining "homeland security information" and detailing procedures for sharing information).
206. Id.
207. Id. at 30–32.
information would help a terrorist to threaten the public’s safety.\textsuperscript{208} In addressing this issue, the agency should consider not only whether the information itself could be harmful, but also whether it could be part of a harmful “mosaic.”\textsuperscript{209} The second question is whether the information is already available in the public domain.\textsuperscript{210} If so, there is a rebuttable presumption that such information should continue to be available.\textsuperscript{211} The third question is whether there is any “reasonable way of controlling” information that is already available but needs to be withheld.\textsuperscript{212} The final question is whether there are other considerations that would warrant disclosure, if the information is not otherwise available to the public sector.\textsuperscript{213} The study suggests that this provision would act as a check on information provided by private corporations, which is generally protected under the Critical Infrastructure Information Act.\textsuperscript{214} Not all information about infrastructure is dangerous, and even some information that is potentially dangerous needs to be available for other reasons.\textsuperscript{215}

C. The Study’s Model Could Provide a Framework for Revising the FOIA

1. Congress Should Charge Agencies to Identify Threats

Though the Maryland study did not focus on the FOIA, it addressed issues pertinent to how the FOIA should operate in the twenty-first century. The outline suggested by the study would provide a good framework for an amendment to the statute, although any amendment

\textsuperscript{208} Id. at 30.
\textsuperscript{209} Id. Some information may not be harmful taken alone but could be harmful when used in conjunction with other information. See Cocco, supra note 98, at 11 (explaining how the CIA has used that argument to try to prevent the release of old presidential briefings); Blumenfeld, supra note 107, at A1 (describing how a graduate student mapped the United States’ fiber optic network, one wire at a time).
\textsuperscript{210} Gansler & Lucyshyn, supra note 15, at 30.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 31 (noting that attempts “to rein-in information that has already been widely disseminated may prove to be a daunting—or even impossible—task, especially when the information is already available and/or in use abroad”).
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} For example, the authors of the Maryland study point to information about anthrax. While information on its handling may pose a security threat, information on its treatment needs to be available. Id. at 31. The authors suggest that the “countervailing considerations of public health, medical research, and emergency planning militate in favor of disclosure.” Id.
would need greater specificity to achieve the goals this Comment proposes. As the study suggests, there needs to be a new category of information that is not classified but should not be made available without agency experts analyzing the impact of disclosure.\textsuperscript{216} The name of such information is not important, so the study's suggestion of "CUSI" is acceptable.

Congress should revise the national security exemption in the FOIA to state that information need not be disclosed if it is "properly classified" by Executive Order, or if it meets guidelines established under each agency's CUSI provisions. The revised section could use the Maryland study as a model for directing each agency's inquiry into what should be classified as CUSI. First, the statute should define CUSI. The Maryland study's definition is effective: "information that, if improperly disseminated and utilized, could egregiously endanger public safety."\textsuperscript{217} Next, the statute should identify the types of information that meet the requirements of this definition. As the study suggests, information that should raise concerns would include information related to the research, development, and utilization of weapons of mass destruction; information related to critical infrastructure; and information related to intelligence and security that needs to be shared among government agencies.\textsuperscript{218} The revised statute should then give the agency a series of guidelines for determining which information should be withheld based on these concerns. The questions raised by the study should be part of those guidelines. Would the information enable a terrorist to threaten Americans' safety?\textsuperscript{219} Is the information already available, and if so, is there a compelling reason to make it unavailable?\textsuperscript{220} If information is available and should not be, is there a way to remove the information from the public sector?\textsuperscript{221} If the information presents security concerns, are there countervailing considerations that would militate in favor of the information being released?\textsuperscript{222}

The final step, which goes beyond what the Maryland study suggests, is where specificity can be achieved. The revised FOIA should charge each agency with providing a list of specific classes of information that will be labeled as CUSI. The agency should make that list publicly available, and it should update the list annually. Clearly,

\begin{itemize}
\item \textsuperscript{216} See id. at 27.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id. at 27-30.
\item \textsuperscript{219} Id. at 30.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id. at 31.
\item \textsuperscript{222} Id. at 32-32.
\end{itemize}
such lists should not give away any specific information that could be damaging. In other words, the lists should include categories such as “information that details the operational mechanisms of any nuclear power plant,” without suggesting what those mechanisms might be. Then, the FOIA expert at each agency should use those specific guidelines to label certain documents as CUSI. Information so labeled should not be released unless the citizen or organization seeking it makes a specific showing of why the information is needed. Agencies would address these requests on a case-by-case basis, balancing the individual’s need and the sensitivity of the information. The statute should direct agencies to presume disclosure of information that is not labeled as CUSI.

Under this plan, the judiciary will continue to act as a check on agency decisions. If the agency refuses to release information labeled as CUSI, then the citizen or organization can file a court action for disclosure, but the judge’s presumption will favor non-disclosure. Conversely, any information that does not meet an agency’s specific CUSI guidelines should be made available. If the agency withholds such information, then the citizen or organization can file a court action, and the statute should establish a strong presumption that such information should be released. The statute should specifically state that the judges owe no deference to the executive branch regarding information that does not fall under an agency’s specific list of exempted information. The statute should also establish either a Congressional or judicial check on the CUSI lists provided by agencies, to prevent agencies from labeling information as CUSI without justification.

The revised statute should also require the agencies to consider the “mosaic” problem. Some information, such as the information Gorman used in his thesis, can be disclosed in pieces but can be dangerous as a whole. Such information should maintain a presumption of disclosure, but it should not be available on the Internet. The Internet presents unique dangers because there is no way to monitor who is accessing the information. Or, as Addicott puts it, “The cyber-world is the wild, wild west, and there are many ways that people can do harm.” For example, the fiber-optic network information in Gorman’s thesis would be of legitimate interest to companies or citizens who want to locate a particular network in the area of their business or home. They ought to be able to obtain that information. However, by forcing people to make

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223. See Blumenfeld, supra note 107, and accompanying text.
224. Telephone interview with Jeffrey Addicott, supra note 7.
FOIA requests to get it, the agency can monitor whether a citizen or group is trying to create the kind of "terrorist treasure map"\textsuperscript{225} that Gorman created. Such a plan could be better for security than simply withholding the information because alert agency officials might anticipate a threat if they notice an unusual demand for a particular class of information.

In determining what information belongs on the Internet, agencies should consider not just the potential for security problems, but also the benefit to the public of having certain information widely available. One example is the Federal Aviation Administration's website that details items passengers can carry onto airplanes.\textsuperscript{226} One could argue that such information would be valuable to terrorists hoping to hijack an airplane. That is, terrorists could look at the list and determine whether any of the allowed items could help them in their mission. However, such information ought to be available, because it is a valuable resource for travelers.

2. \textit{This Proposal Would Protect Security and the Public's Right to Information}

A revised FOIA calling for specific labels on potentially dangerous information, while also expressing concerns about the Internet, would preserve the important considerations on both sides of the debate. On one hand, the agencies would be forced to analyze carefully the information within their domain to determine what needs to be kept private. A system with specific categories of exemptions, updated annually, would better protect national security than a system in which vague exemptions might allow information to get into the wrong hands. Meanwhile, the requirement of specific categories of exemptions would enable disclosure of information that ought to be disclosed. Under the current regime, when the executive branch uses security as an excuse for withholding information, the judicial branch rubber-stamps such policies.\textsuperscript{227} This proposal, on the other hand, would mandate that the judiciary give no deference to the executive in cases in which the information did not fall under established CUSI guidelines.

Open government advocates might ask how this Comment could

\textsuperscript{225} Gansler & Lucyszyn, supra note 15, at 16 (quoting Blumenfeld, supra note 107, at A1).


\textsuperscript{227} See discussion supra Part V.B.
argue against weakening the FOIA and then propose new exemptions to disclosure. However, the goal of this proposal is not to increase the volume of information withheld. In most cases, the information withheld under new guidelines would be information that would be withheld under the present exemptions, if they were properly applied. The goal of this proposal is to identify clearly the information that needs to be withheld, and then to reaffirm the public's right to information that does not fall under those guidelines.

While this proposal aims for specificity, its inclusion of judicial review recognizes the evolving nature of the terrorism threat. There is no feasible way to create a constantly up-to-date list of specific information that should and should not be released. Moreover, the same piece of information may be too risky to set out for general release, but a particular group or citizen may have a particular need for the information. Therefore, there should be no ironclad list of information that should or should not be disclosed. If this proposal were enacted, individuals or groups with a particular need for information labeled as CUSI could make their case to the appropriate agency, and then if necessary, to the courts. Meanwhile, if the agency discovered that potentially dangerous information was not on its CUSI list, it could withhold the information, and though it would face a negative presumption in court, the agency would have the opportunity to explain its reasons for protecting the information. Therefore, while striking a balance between openness and security, the revised statute would also strike a balance between specificity and the need for flexibility in special circumstances.

If such a statute were enacted and achieved the desired goals, it could bring the additional benefit of acting as a model for the states, as they wrestle with these same issues in interpreting their freedom of information statutes.

VII. CONCLUSION

The Freedom of Information Act is an important part of our society and must remain strong as Americans work to protect themselves in a

228. As previously discussed, nine exemptions are in place that allow agencies to withhold information. See discussion supra Part II.A. These exemptions give agencies a great deal of latitude, and the issue becomes how they should use that latitude. Because this proposal requires a thorough examination of potentially harmful information, the information actually withheld should be information with a significant chance of posing a threat. Any such information could likely be squeezed into at least one of the nine exemptions already present, but the idea is to create clearer guidelines.
changing world. If we turn our backs on the FOIA, we are turning our backs on the First Amendment, and therefore, on the fundamental principles that form the foundation of our democracy. Yet, in ascribing significant power to information, we must realize that such power could be dangerous if used by those intending to harm the nation. The tension between the FOIA and security concerns demonstrates that the FOIA needs to be updated for the 21st century, with the aim of protecting both America's security and its values.

The current climate favors secrecy, in part because the FOIA leaves ample room for interpretation. The executive branch tends to interpret the exemptions to the FOIA broadly, and the judiciary tends to accept such interpretations. A revised FOIA with more specific guidelines regarding the release of information would ensure greater security, while ensuring the release of information that should be made public.

Whether or not this particular model is followed, Congress needs to provide better guidelines for the American public. Such guidelines would assist citizens seeking information that might be vital to their jobs or to their lives, and they would assist agencies that do not want to violate the law, but also do not want to endanger the safety of Americans. The goal in revising the FOIA should not be identifying more ways for the executive branch to conceal its policies and activities in the name of security. The goal should be keeping America safe; keeping America as a place that respects American values, as embodied in the Constitution; and keeping America as a place where a well-informed population is watching its government through clear glass, not through a dark curtain.